

**IC 29-1-3****Chapter 3. Taking Against a Will and Rights of Pretermitted Heirs**

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**IC 29-1-3-0.1 Application of certain amendments to chapter**

Sec. 0.1. The following amendments to this chapter apply as follows:

- (1) The amendments made to section 1 of this chapter by P.L.168-1988 do not apply to individuals who die before July 1, 1988.
- (2) The amendments made to section 2 of this chapter by P.L.238-2005 apply to the estate of a person who dies after June 30, 2005.
- (3) The amendments made to sections 1 and 7 of this chapter by P.L.176-2003 apply only to the estate of an individual who dies after June 30, 2003.
- (4) The amendments made to section 1 of this chapter by P.L.61-2006 apply to the estate of an individual who dies after June 30, 2005.

*As added by P.L.220-2011, SEC.467.*

**IC 29-1-3-1 Limitations and conditions**

Sec. 1. (a) When a married individual dies testate as to any part of the individual's estate, the surviving spouse is entitled to take against the will under the limitations and conditions stated in this chapter. The surviving spouse, upon electing to take against the will, is entitled to one-half (1/2) of the net personal and real estate of the testator. However, if the surviving spouse is a second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving a child or children or the descendants of a child or children by a previous spouse, the surviving second or subsequent childless spouse shall upon such election take one-third (1/3) of the net personal estate of the testator plus an amount equal to twenty-five percent (25%) of the remainder of:

- (1) the fair market value as of the date of death of the real property of the testator; minus
- (2) the value of the liens and encumbrances on the real property of the testator.

In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution.

(b) When the value of the property given the surviving spouse under the will is less than the amount the surviving spouse would receive by electing to take against the will, the surviving spouse may elect to retain any or all specific bequests or devises given to the surviving spouse in the will at their fair market value as of the time of the decedent's death and receive the balance due in cash or property.

(c) Except as provided in subsection (b), in electing to take against the will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept the elected award in lieu thereof.

(d) When a surviving spouse elects to take against the will, the surviving spouse shall be deemed to take by descent, as a modified share, the part of the net estate as does not come to the surviving spouse by the terms of the will. Where by virtue of an election pursuant to this chapter it is determined that the surviving spouse has renounced the surviving spouse's

rights in any devise, either in trust or otherwise, the will shall be construed with respect to the property so devised to the surviving spouse as if the surviving spouse had predeceased the testator.

*Formerly: Acts 1953, c.112, s.301. As amended by Acts 1982, P.L.171, SEC.14; P.L.168-1988, SEC.1; P.L.176-2003, SEC.4; P.L.61-2006, SEC.2.*

#### **IC 29-1-3-2 Time**

Sec. 2. (a) Except as provided in subsection (b), the election by a surviving spouse to take the share hereinbefore provided must be made not later than three (3) months after the date of the order admitting to probate the will against which the election is made.

(b) If, at the expiration of such period for making the election, litigation is pending to test the validity or determine the effect or construction of the will or to determine the existence of issue surviving the deceased, or to determine any other matter of law or fact which would affect the amount of the share to be received by the surviving spouse, the right of such surviving spouse to make an election shall not be barred until the expiration of thirty (30) days after the final determination of the litigation.

*Formerly: Acts 1953, c.112, s.302. As amended by P.L.238-2005, SEC.7.*

#### **IC 29-1-3-3 Forms; recording; service**

Sec. 3. (a) The election to take the share hereinbefore provided shall be in writing, signed and acknowledged by the surviving spouse or by the guardian of his estate and shall be filed in the office of the clerk of the court. It may be in the following form:

I, A.B., surviving wife (or husband) of C.D., late of the county of \_\_\_\_\_ and state of \_\_\_\_\_, do hereby elect to take my legal share in the estate of the said C.D. and I do hereby renounce provisions in the will of the said C.D. inconsistent herewith.

Signed,

(Signature)

(Acknowledgment)

(b) Said election shall be recorded by such clerk in the record of wills, marginal reference being made from such record to the book and page in which such will is recorded, and from the record of such will to the book and page where such election is recorded.

(c) The clerk shall cause a copy of said election to be served upon the personal representative and his attorney of record by United States mail addressed to such persons at their respective addresses as shown by the petition for probate of will and appointment of personal representative.

*Formerly: Acts 1953, c.112, s.303; Acts 1969, c.67, s.1; Acts 1975, P.L.288, SEC.2.*

#### **IC 29-1-3-4 Personal right; election by attorney in fact or guardian**

Sec. 4. (a) Except as provided in subsection (b), the right of election of the surviving spouse is personal to the spouse. It is not transferable and cannot be exercised subsequent to the spouse's death. A person with a valid power of attorney for the surviving spouse may elect for the spouse if the power of attorney has general authority with respect to estates as provided in IC 30-5-5-15(a)(4). If the surviving spouse is a protected person, the court may order the guardian of the spouse's estate to elect for the spouse.

(b) The spousal election may be exercised subsequent to the spouse's death under the following circumstances:

(1) The surviving spouse died before the election could be made.

(2) The election is being made to recover Medicaid benefits that were paid on behalf of the deceased surviving spouse.

The office of Medicaid policy and planning may exercise the right of election under this subsection. The spousal election is only enforceable up to the amount of Medicaid benefits that were received and the amount may only be distributed to the office of Medicaid policy and planning.

*Formerly: Acts 1953, c.112, s.304. As amended by P.L.33-1989, SEC.35; P.L.252-2001, SEC.10; P.L.246-2005, SEC.213.*

**IC 29-1-3-5 Binding effect; change**

Sec. 5. An election by or on behalf of a surviving spouse to take the share provided in section 1 of this chapter once made shall be binding and shall not be subject to change except for such causes as would justify an equitable decree for the rescission of a deed.

*Formerly: Acts 1953, c.112, s.305. As amended by Acts 1982, P.L.171, SEC.15.*

**IC 29-1-3-6 Waiver of right**

Sec. 6. (a) The right of election of a surviving spouse given under section 1 of this chapter may be waived before or after marriage by a written contract, agreement signed by the party waiving the right of election, after full disclosure of the nature and extent of such right, if the thing or the promise given such party is a fair consideration under all the circumstances.

(b) The promise of marriage, in the absence of fraud, is sufficient consideration in the case of an agreement made before marriage. An agreement waiving a right of election may be filed in the same manner as provided for the filing of an election under section 3 of this chapter.

*Formerly: Acts 1953, c.112, s.306. As amended by P.L.283-1987, SEC.3.*

**IC 29-1-3-7 Failure to elect; intestate succession**

Sec. 7. When a surviving spouse makes no election to take against the will, he shall receive the benefit of all provisions in his favor in the will, if any, and shall share as heir, in accordance with IC 29-1-2-1, in any estate undisposed of by the will. The surviving spouse is not entitled to take any share against the will by virtue of the fact that the testator made no provisions for him therein, except as he shall elect pursuant to IC 29-1. By taking under the will or consenting thereto, he does not waive his right to the allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of that right.

*Formerly: Acts 1953, c.112, s.307. As amended by Acts 1977, P.L.296, SEC.1; P.L.176-2003, SEC.5.*

**IC 29-1-3-8 Afterborn or adopted children; omitted heirs**

Sec. 8. (a) When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one (1) or more children known to him to be living and devised substantially all his estate to the spouse who survives him.

(b) If, at the time of the making of his will, the testator believes any of his children to be dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

*Formerly: Acts 1953, c.112, s.308.*